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Supreme Court, U.S.
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No. (1)

In The
Supreme Court of the United States

CYNTHIA MARIE LONG, individually,
and as Personal Representative of the
Estate of Dustan Dominic Long Decedent,

Petitioner,

v.

CITY AND COUNTY OF HONOLULU;
PATRICK A. STERLING, Officer, Honolulu
Police Department; JOHN DOES, 1-10,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit has rendered a decision in direct conflict with Supreme Court precedent prohibiting summary judgment where the credibility of movants' witness is challenged and specific bases for possible impeachment are shown in a case involving deadly force by police being challenged by Petitioner as "unreasonable."

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 511 F.3d 901 (9th Cir. 2007) (Appendix 1 to 13). The opinion of the United States District Court for the District of Hawaii is reported at 378 F.Supp.2d 1241 (D.Haw. 2005) (Appendix 14 to 31). A timely petition for rehearing and suggestion for rehearing ***en banc*** was denied by way of an unpublished written order filed by the Ninth Circuit on February 5, 2008. (Appendix 32).

JURISDICTION

The Ninth Circuit filed its decision on December 21, 2007 and thereafter entered its order denying petitioner's motion for rehearing on February 5, 2008. This court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision by writ of certiorari.

CONSTITUTIONAL AND RULE PROVISIONS INVOLVED

4th Amendment, U.S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 56, Federal Rules of Civil Procedure

(a) **By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 20 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) **By a Defending Party.** A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) **Serving the Motion; Proceedings.** The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) **Case Not Fully Adjudicated on the Motion.**

(1) ***Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts – including items of damages or other relief – are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) ***Establishing Liability.*** An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 & 1343 for the case raised a federal question involving the 4th Amendment, U.S. Constitution. Supplemental jurisdiction was also invoked for additional state tort claims under 28 U.S.C. § 1367. Petitioner sought vindication, *inter alia,* of her constitutional rights for which 42 U.S.C. § 1983 provides a remedy.

The petitioner is the mother and personal representative of her 20 year old son Dustan Long (hereafter "Long") killed by Officer Sterling on June 3, 2001. This officer is a sniper with the Special Services Division of the Honolulu Police Department (commonly referred to as "SWAT"). Officer Sterling has a history of using excessive force while with the Honolulu Police Department.

A few hours prior to this shooting Long was at his home in Wahiawa, Hawaii, hosting a graduation party. The Party got out of hand when an uninvited and unruly group of five (hereafter "group") showed up and began to harass Long's guests. When Long told the group to leave, they told him, "f--- you." This provoked Long to get a .22 caliber rifle which he fired into the air shouting for everyone to leave. As people were exiting, the group began to beat up one of Long's guests and then dragged him out to the front street where they continued to beat him. Long then came out to this area of his front yard and fired shots into the air which stopped the group who then began to flee. However as they are driving away Long fired more rounds at the car and unfortunately wounded two of the group.

Police were called and a standoff situation developed between the police, who surrounded the Long property, and Long. This situation was only tolerated by the police for a few hours so that by 0452 hours Long was shot dead by Officer Sterling who fired a single bullet center mass through Long's chest. The bullet had such velocity that it not only penetrated

Long, but also the garage door behind where Long was standing when he was shot.

The "probable cause" for Officer Sterling's use of deadly force was his contention that he observed Long point a rifle in the direction of fellow officers, that he heard the sound of the rifle firing, that he saw the rifle jerk upon being fired, and heard over the police radio that Long was shooting at them.

Officer Sterling stated he could see 10 to 15 feet on either side of Long. His partner, Officer Dalbec,[1] who was only 1 to 2 feet away from Officer Sterling so as to have a virtually identical view of the suspect said just the opposite, i.e., he could see nothing at the time Long was shot because his view was blocked by vegetation and junk. However petitioner's reconstructionist inspected this crime scene and looked from Officer Dalbec's position to where Long would be when shot and there was NOTHING blocking Officer Dalbec's observation of Long. Further, Officer Dalbec himself later admitted he could see the bullet hole made by Officer Sterling's gunshot from his sniper position. As such his story is internally inconsistent.

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[1] Snipers with the Honolulu Police Department SWAT work in pairs with one sniper acting as an observer while the other is on his gun. Officers Sterling and Dalbec were positioned across the street from Long's residence, with a direct view down Long's driveway. Long was at the end of this driveway at the time he was shot.

Moreover, no shell casing[2] was ever found in the area where Long was shot despite an arduous search by police. Further no private citizen at the crime scene heard the alleged shot taken by Long as well. As to the shell casing, the Ninth Circuit assumed Long fired no such shot. Appendix (hereinafter "App.") at 4.

When granting Officer Sterling summary judgment based on qualified immunity there were not only the conflicts mentioned above, but internal conflicts with Officer Sterling's own reports as well. In that regard, his description of Long's movements which gave him probable cause to use deadly force changed in material respect over time.

In his first statement given on June 7, 2001, Officer Sterling reported he saw and heard Long fire his rifle and he shot him as he turned around and headed **BACK** to his left (which would be Long's house).

In his second version given on July 11, 2001 Officer Sterling would **ADD** Long was also pointing his rifle at yet another group of officers stationed at the driveway entrance to the Long property so that he took the shot to prevent Long from shooting at this group of officers or his partner Dalbec, or himself.

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[2] A shell casing would have existed if a shot was fired from Long's rifle because it automatically ejects a shell casing when fired.

This story would pretty much be repeated in Officer Sterling's written affidavit seeking qualified immunity. But then when deposed, Officer Sterling would claim he was already in the process of shooting Long **BEFORE** he turned toward the driveway entrance. Further he would **RETRACT** his earlier statement Long was pointing his rifle in the direction of officers in the driveway at the time he shot Long.

There were also parts of Officer Sterling's testimony that did not make sense. For instance in spite of his being able to see 10 to 15 feet on each side of Long at the time of the shooting, Officer Sterling says he immediately lost sight of Long who "just disappeared" after Sterling took his shot. Moreover, Officer Natividad, a sniper also at this crime scene testified in his deposition that based on Officer Sterling's training and experience he should not have lost visual of Long.

There was also conflicting testimony from other SWAT officers who were part of the inner perimeter of SWAT surrounding the Long property. This included Officer Burns who was positioned along the side yard. Although he would claim he could **NOT** see the area where Long was shot, petitioner's reconstructionist reported when he inspected the view from where Officer Burns was stationed, he was able to observe the area where Long was shot.

There was also the negative inference to be drawn from the delay of the police getting to Long to complete his arrest after he was shot, which is the police allowed Long to die. Although Long was shot at 0452 hours, it was not until 0623 hours before police got to his side at which time Long was reported "D.O.A." (dead on arrival). Petitioner's medical expert opined this one and a half hour delay deprived Long of his only chance of survival.

Despite these genuine disputes on material points needed to be resolved before granting immunity, both the trial court and the Ninth Circuit declined to address credibility issues. Rather both courts dismissed petitioner's claims by way of summary judgment finding on the constitutional claims Officer Sterling was entitled to qualified immunity as a matter of law.

When the Ninth Circuit affirmed the district court it ruled in pertinent part as follows:

> Whether Long actually fired his rifle at the officers was immaterial. It was enough that Sterling heard the radio transmission and **OBSERVED** Long point the rifle in the officers' direction. Accordingly we hold that Officer Sterling did not violate Long's Fourth Amendment rights and that he is entitled to qualified immunity.
>
> Appendix at 8

Reconsideration of this opinion was requested but the request was denied February 5, 2008.

REASONS FOR GRANTING THE PETITION

This case involves the wrongful use of deadly force, the intrusiveness of which is **UNMATCHED**, and frustrates the interest of the individual, and of society, in the judicial determination of guilt and punishment. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). Use of deadly force is a seizure subject to the reasonableness requirement of the 4th Amendment. *Id.* at 7. In that regard, use of deadly force for an arrest violates the 4th Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others. *Id.* at 11. All claims that law enforcement officers have used excessive force in the course of an arrest are to be analyzed under the 4th Amendment and its "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989).

The credibility of police officers is of national importance, for police officers are most often the only eyewitness "left standing" when standoff situations arise. As such, there is a critical need to keep in place the well-settled mandate that if the credibility of the movants' witness is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied and the case allowed to proceed to trial. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242 (1986). As a result of the Ninth Circuit's decision police officers can now make up a story and get away with it. This is a throwback to vigilante justice. It is also in derogation of the settled law from the various circuit courts to deal with this issue that have required the court to,

> . . . **CAREFULLY** examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts.
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> *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

Other circuits when requested to evaluate probable cause in deadly force cases involving law enforcement have followed this guide. *Abraham v. Raso*, 183 F.3d 279, 294 (3rd Cir. 1999); *Estate of Smith v. Marascom*, 318 F.3d 497, 514 (3rd Cir. 2003); *Estate of Ingle v. Yelton*, 439 F.3d 191, 195-196 (4th Cir. 2006); *Bazan v. Hidalgo County*, 246 F.3d 481, 492 (5th Cir. 2001); *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996); *Maravilla v. U.S.*, 60 F.3d 1230, 1233-1234 (7th Cir. 1995); and *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 454 (8th Cir. 2002). Therefore the 9th Circuit decision is both at odds with its own circuit but other circuits as well.

Certiorari is also especially important here because the Ninth Circuit has entered a decision

directly in conflict with a Supreme Court mandate that all justifiable inferences be drawn in the **NON**-movant's favor. *Anderson v. Liberty Lobby, Inc., supra*. Applying this mandate to the matter at bench, there were at least three eyewitnesses who saw what Long was doing at the time he was shot. Notwithstanding, only Officer Sterling, the shooter, would say what he alleges he observed, all the while Officers Dalbec and Burns say they "see nothing." The inference from this is they do not want to turn in their cohort, Officer Sterling, who used excessive force. This is commonly known as the "code of silence" which causes police officers to ignore the misdeeds of their fellow officers, which is a situation know to exist in the Honolulu Police Department.

Notwithstanding, the Ninth Circuit made a credibility determination by concluding Officer Sterling did **OBSERVE** Long point his rifle in the direction of fellow officers. When credibility became a genuine issue, it was NOT enough for the court to rely on this officer's contentions of what he said he heard and what he said he saw to determine if he acted reasonably and had probable cause. If no shot was taken, then the inference from that fact would be that Officer Sterling could not have heard the shot he claimed he heard or seen Long's rifle jerk in response to firing a shot, that he says he saw. This means he may be perceived by the jury as giving a self-serving story. It is a general principal of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt. *Reeves v. Sanderson Plumbing Products, Inc.*, 530

U.S. 133, 147 (2000). The affirmative evidence in the record, if believed, when taken in the light most favorable to Long, would tend to discredit the police officers' story and could convince a rational factfinder that Officer Sterling acted unreasonably. In that regard, the mere fact that a witness is interested in the result of a suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 628 (1944).

The Ninth Circuit violated the settled principle of summary judgment law which is "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc., supra.*

CONCLUSION

The Court should grant the petition for writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

JACK SCHWEIGERT
Attorney for Petitioner

Cynthia Marie LONG, individually, and as Personal Representative of the Estate of Dustan Dominic Long, Plaintiff-Appellant,

v.

CITY AND COUNTY OF HONOLULU; Patrick A. Sterling, Officer, Honolulu Police Department; John Does, 1-10, Defendants-Appellees.

No. 05-16567.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 5, 2007.

Filed Dec. 21, 2007.

Jack Schweigert, Honolulu, HI, for the plaintiff-appellant.

Brian Y. Hiyane, Honolulu, HI, for the defendants-appellees.

Appeal from the United States District Court for the District of Hawaii; Samuel P. King, Senior District Judge, Presiding. D.C. No. CV-02-00271-SPK/KSC.

Before: DIARMUID F. O'SCANNLAIN, A. WALLACE TASHIMA, and MILAN D. SMITH, JR., Circuit Judges.

MILAN D. SMITH, JR., Circuit Judge:

Cynthia Long (Ms. Long), mother of decedent Dustan Long (Long), appeals the grant of a motion for summary judgment in favor of Defendants, City and

County of Honolulu, and police officer, Patrick Sterling. Ms. Long primarily contends that Sterling used deadly force against her son in violation of his Fourth Amendment rights and that the district court erred in granting Sterling qualified immunity. Because we conclude that Sterling acted in an objectively reasonable manner under the circumstances, we affirm the district court's judgment. *See Long v. City & County of Honolulu,* 378 F.Supp.2d 1241 (D.Haw.2005).

I. Factual Background

On the night of June 3, 2001, Long invited people to a party at his home. At approximately 2 a.m., an uninvited group arrived, harassed another guest, and instigated a fight. In response, Long fired shots from a .22 caliber rifle – once to demand that all of his guests leave and again shortly thereafter in an attempt to stop several uninvited persons from beating his friend, Chauncery Jarvis. As the uninvited group got into a car to leave, Long fired several more shots in their direction, hitting two of the passengers, who then called the police.

As the party ended, Long and his friend, Kurt Umeno, carried Jarvis to the back of the house by the Jacuzzi, where he lay until the police found and awakened him several hours later.

The police arrived soon thereafter and were later replaced by a SWAT team. The SWAT team manned the perimeter of the house. Long and Umeno spoke several times over the phone. Umeno claims that

Long was scared that the police would shoot him and that he wanted to surrender. In any event, the police told Long to surrender, but he did not, and initially barricaded himself in the house.

Long was agitated throughout the night and held a .22 caliber rifle as he walked around the property. He shouted various threats at the police. For example, at 4:07 a.m., he told the police that they had ten seconds to get the "fuck out of his yard" and started a countdown. The evidence suggests that he then fired a shot toward the front of the house. He also threatened to shoot out the lights the police were shining on the property.

Officers Sterling and Dalbec were positioned as snipers on the roof of a house across the street, some 220 feet away from where Long was located. Immediately before Sterling fatally shot Long, Officers Marini and Cannella were positioned to the side of the house, behind a large bamboo hedge. Long was walking back and forth between a carport and a garage just on the other side of the hedge where officers Marini and Cannella were located and was aware of the officers' presence.

According to the CAD report, at 4:47 a.m., officers Marini and Cannella reported that they jumped into a ditch for cover because Long was shouting threats.[1] Officer Marini claims that he heard Long

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[1] A CAD report is a stenographic record created by a radio dispatcher whose duty it is to type everything heard over the

(Continued on following page)

yell, "I told you fuckers get the fuck back. Have some of this." At 4:51 a.m. the officers said over the radio, "Shots fired. He just shoot [sic] at us."

Upon hearing this radio call, Sterling shot Long. According to Sterling, he saw Long raise his rifle to about chest level and fire one shot immediately prior to the radio call. The police, however, were not able to recover a shell casing from this alleged shot, so we assume no shot was actually fired. Sterling claims that he then lost sight of Long. Ms. Long's expert contends that Sterling could not have lost sight of Long.

The police waited for a light armored vehicle to arrive before entering the property. The CAD report indicates that the police attempted to contact Long by calling the house phone, were unsure where Long was, and did not know whether it was safe to enter the premises. After the police finally entered the property, Long was found dead at 6:23 a.m., with a rifle located to the right of his body.

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radio frequency, which also marks the time of the statements fairly accurately.

Contrary to the CAD report, Marini and Cannella testified that they jumped into the ditch as Long was shooting at them at 4:52 a.m., creating a discrepancy of four minutes between the CAD report and their testimony. This discrepancy is not material for the purposes of determining whether it was objectively reasonable for Officer Sterling to shoot Long.

II. Procedural Background

Ms. Long, in her individual capacity and as representative of Long's estate, commenced this action against Sterling and the City and County of Honolulu. Ms. Long sought damages under 42 U.S.C. § 1983 for use of excessive force against Long, the city's failure to render medical aid, and the municipality's failure to train officers on the use of deadly force. She also brought related state law claims.

Defendants moved for summary judgment, arguing that Sterling was entitled to qualified immunity and that no evidence existed to support municipal liability. The motion was denied without prejudice to allow for more discovery. Defendants later renewed their motion. The district court then granted the Defendants' motion, holding that there was no constitutional violation and no basis for municipal liability, and entered final judgment. Ms. Long timely appeals.

III. Standard of Review and Jurisdiction

We review the grant of a motion for summary judgment de novo. *Blankenhorn v. City of Orange,* 485 F.3d 463, 470 (9th Cir.2007). The district court's decision on qualified immunity is also reviewed de novo. *Id.* Under this standard, the facts are viewed in the light most favorable to the nonmoving party, and all reasonable inferences are drawn in that party's favor. *Brosseau v. Haugen,* 543 U.S. 194, 195 n. 2, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004); *Blankenhorn,* 485 F.3d at 470. In a Fourth Amendment excessive

force case, "defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the plaintiff, that the officer's use of force was objectively reasonable under the circumstances." *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir.1994).

We have jurisdiction under 28 U.S.C. § 1291.

IV. Discussion

A. Qualified Immunity

The defense of qualified immunity "shields government officials performing discretionary functions from liability for civil damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Scott,* 39 F.3d at 914 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

Where an officer raises this defense, we undertake a two part analysis. First, we ask, "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If no violation occurred on the alleged facts, this ends the inquiry. *Id.* "On the other hand, if a violation could be made out on a favorable view of the parties' submissions," we then look to see whether the violated right was clearly established. *Id.*

Claims of excessive and deadly force are analyzed under the Fourth Amendment's reasonableness standard. *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); *Tennessee v. Garner,* 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). We must determine whether this shooting was objectively reasonable in light of the facts and circumstances confronting the officers "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham,* 490 U.S. at 396-97, 109 S.Ct. 1865. The use of deadly force is "reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Scott,* 39 F.3d at 914 (quoting *Garner,* 471 U.S. at 3, 105 S.Ct. 1694). We must allow for "the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation." *Id.* (quoting *Graham,* 490 U.S. at 396-97, 109 S.Ct. 1865). Factors to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham,* 490 U.S. at 396, 109 S.Ct. 1865.

We hold that Officer Sterling's conduct meets the objective reasonableness standard. Prior to taking the fatal shot, Sterling had observed Long's agitated behavior, heard him threaten to shoot the police,

observed him carrying a .22 caliber rifle, and knew that he had previously shot at a car full of people and wounded two people therein earlier that night. Under these circumstances, when fellow officers radioed that Long was yelling threats at them and then radioed that Long was shooting at them, Sterling had probable cause to believe that Long posed an immediate danger to these officers. In the exigent circumstances of the night, Sterling acted in an objectively reasonable manner.

We are mindful that we must be wary of self-serving accounts by police officers when the only non-police eyewitness is dead. *See Scott,* 39 F.3d at 915. We note, however, that here, unlike the situation in *Scott,* we have the benefit of multiple eye witnesses and a CAD report that fairly accurately recorded the SWAT team's activities on the night of Long's death.

Ms. Long's claims of factual error in the police accounts do not change our analysis. From the perspective of a reasonable officer in Sterling's position, it is immaterial whether Marini and Cannella jumped into the ditch at 4:47 or 4:52 a.m. Though a closer question, whether Long actually fired his rifle at these officers is also immaterial. It is enough that Sterling heard the radio transmission and observed Long point the rifle in the officers' direction.

Accordingly, we hold that Officer Sterling did not violate Long's Fourth Amendment rights and that he is entitled to qualified immunity.

B. Municipal Liability

Ms. Long contends that the city is also liable because it failed to properly train the officers on the use of deadly force, ratified Sterling's unconstitutional conduct, failed to properly supervise and control its officers, and failed to render medical aid to Long.

If no constitutional violation occurred, the municipality cannot be held liable and whether "the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (emphasis omitted).

We also reject the claim that the police officers were inadequately trained on the use of deadly force. "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *City of Canton v. Harris,* 489 U.S. 378, 389, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). If there was no constitutional violation of Long's rights, there is "no basis for finding the officers inadequately trained." *Scott,* 39 F.3d at 916.

Similarly, the city cannot be held liable for the failure to render medical aid without evidence that the failure to render aid was pursuant to a city policy or custom. *City of Canton,* 489 U.S. at 388-89 & n. 8,

109 S.Ct. 1197. Ms. Long claims that the city is liable "because of its duty to render reasonable care to the suspect it shoots." The municipality, however, cannot be liable under a *respondeat superior* theory. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

C. State Law Claims

Ms. Long contends that the district court abused its discretion by retaining jurisdiction over pendent state claims after the original federal claims had been dismissed. The retention of jurisdiction was proper. "[A] federal district court with power to hear state law claims has discretion to keep, or decline to keep, them under the conditions set out in [28 U.S.C.] § 1367(c). . . ."[2] *Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000 (9th Cir.1997) (en banc).

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[2] 28 U.S.C. § 1367(c) states:

> The district court may decline to exercise supplemental jurisdiction over a claim . . . if –
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

On appeal, Ms. Long's state law claims are for the intentional infliction of emotional distress, gross negligence, and negligent training, supervision, and control. She also makes a request for punitive damages.[3] We hold that these state law claims are meritless and were properly dismissed. Accordingly, Ms. Long's punitive damage claims also fail.

1) Intentional Infliction of Emotional Distress

In Hawaii, the elements of an action for intentional infliction of emotional distress are adopted from the Restatement (Second) of Torts § 46 (1965) and are: 1) that the conduct allegedly causing the harm was intentional or reckless, 2) that the conduct was outrageous, and 3) that the conduct caused 4) extreme emotional distress to another. *Hac v. Univ. of Hawaii,* 102 Hawai'i 92, 73 P.3d 46, 49 (2003). The restatement defines outrageous as "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Nagata v. Quest Diagnostics, Inc.,* 303 F.Supp.2d 1121, 1127 (D.Hawai'i

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[3] Ms. Long also pleaded wrongful death and negligent infliction of emotional distress at the district court level. Since she did not argue these claims on appeal, we do not address them here. We also do not address the defense of qualified privilege available under Hawaii state law because Defendants failed to raise the issue. *See Towse v. Hawaii,* 64 Haw. 624, 647 P.2d 696, 702 (1982).

2004) (quoting Restatement (Second) of Torts § 46, cmt. d).

Sterling's behavior could not be outrageous because he acted in an objectively reasonable manner. The district court properly dismissed this claim.

2) Gross Negligence

Gross negligence is the "entire want of care which would raise a presumption of conscious indifference to consequences." *Yoshizawa v. Hewitt,* 52 F.2d 411, 413 (9th Cir.1931) (construing Hawaii territorial law). Without further explanation, Ms. Long points to three things as evidence of gross negligence: 1) failure to render medical aid, 2) the estimated six shootings per year that occurred under the deadly force policy in effect at the time of Long's shooting, and 3) the Chief's ratification of Sterling's conduct without inquiring further into some inconsistencies in the evidence.

The district court did not err in finding no evidence of gross negligence. The police force's decision to wait for a light armored vehicle for safety reasons does not rise to the level of conscious indifference, even if the delay may have contributed to Long's death. Moreover, there is no evidence in the record that the deadly force policy and the Chief's investigation were inadequate and contributed to Long's death.

3) Negligent Training, Supervision, and Control

Because there is no evidentiary basis to conclude that the city was grossly negligent in its training of its police officers, the claim of negligent training, supervision, and control necessarily fails.

The judgment of the district court is

AFFIRMED.

378 F.Supp.2d 1241 (D.Hawai'i 2005)

Cynthia Marie LONG, individually, and as Personal Representative of the Estate of Dustan Dominic Long, Plaintiff,

v.

CITY AND COUNTY OF HONOLULU, Officer Patrick A. Sterling, Defendants.

No. CIV. 02-00271SPK/KSC.

United States District Court, D. Hawai'i,
July 11, 2005.

Jack F. Schweigert, Honolulu, HI, for Plaintiff.

James C. Butt, Marie Manuele Gavigan, Wyeth M. Matsubara, Office of Corporation Counsel, James Kawashima, Toby M. Tonaki, Watanabe Ing Kawashima & Komeiji, Honolulu, HI, for Defendants.

ORDER GRANTING DEFENDANTS' REVISED MOTION FOR SUMMARY JUDGMENT

SAMUEL P. KING, District Judge.

INTRODUCTION

Defendants Officer Patrick A. Sterling and the City and County of Honolulu renew their motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, primarily asserting there are no material questions of fact as to (1) qualified immunity for Officer Sterling, and (2) "deliberate indifference" on the "*Monell* claim" for municipal

liability against the City. Common law claims are also addressed, although disposition of the state law claims follows from the rulings on the federal claims.

On January 3, 2003, the Court denied without prejudice a similar motion brought by Defendants. Discovery was not complete then and Plaintiff requested time for additional discovery under Fed.R.Civ.P. 56(f). The Court denied the Defendants' motion without prejudice to Defendants renewing it after completion of discovery. Meanwhile, Officer Sterling served a year in Iraq as a reservist soldier recalled to active duty and the case was stayed pursuant to 50 U.S.C. App § 521 from April 2003 until early-2004.[1] Discovery is now complete and Defendants have renewed their motion for summary judgment. The motion was argued on June 23, 2005, with James Kawashima appearing for Defendants and Jack Schweigert appearing for Plaintiff.

DISCUSSION

Given the prior proceedings, the Court begins where it left off when the previous motion was denied. The Court will not repeat all the background here. Important facts are repeated where appropriate, but otherwise the January 3, 2003, order is incorporated

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[1] The Court was informed by the parties at oral argument that Officer Sterling is currently serving another term in Iraq. The July 2005 trial date was vacated pending disposition of this motion.

by reference and the Court presumes familiarity with the issues as analyzed previously.

1. Qualified Immunity

In applying the test for allowable use of deadly force as set forth in *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) and *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the primary issue of fact identified during the prior proceedings was whether Officer Sterling had probable cause to believe that Dustan Long posed a "threat of serious physical harm, either to [himself] or others," to justify the use of deadly force when considering objectively the situation be confronted when he shot Long in June of 2001.[2] Much was made of whether Long actually fired a shot at other officers immediately before Officer Sterling shot Long. The January 2003 order indicated that:

> . . . Long might indeed have presented a real and immediate threat to the safety of officers when Sterling shot him. Long had shot others earlier and he was armed. Nevertheless, the record is not clear as to exactly what occurred, especially as to whether Long had actually

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[2] *See, e.g., Brosseau v. Haugen*, ___ U.S. ___, ___, ___, 125 S.Ct. 596, 598, 160 L.Ed.2d 583 (2004) (reiterating that use of deadly force is not constitutionally unreasonable "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others") (quoting *Garner*, 471 U.S. at 11, 105 S.Ct. 1694).

> fired at the police. If Long had not fired at officers, perhaps, depending upon the circumstances, he did not pose an "immediate" threat. Although qualified immunity should be decided early in a proceeding, the record is sufficiently vague at present so as to allow Plaintiff[ ] the opportunity for further discovery.

[January 2, 2003, Order at 8].

Reviewing the record construed in favor of Plaintiff as is required at a summary judgment stage of the proceedings, there is still a question of fact as to whether Long actually fired a shot at officers immediately before Sterling shot him. Much of the evidence indicates that Long did in fact fire at Officers Marini or Canella. But no corresponding bullet or casing from Long's .22 rifle was found.[3] Several witnesses say they didn't hear a shot fired at around 04:52 hours (other than the fatal shot by Sterling around 04:52 hours) or can't recall hearing a shot preceding Sterling's shot. On the other hand, several witnesses (Officers Sterling, Dalbec, Kaholokula, Vargas, Fuata,

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[3] At least three casings were found. [Shinsato Depo. at 26; Murakami Depo. at 16 (indicating five casings)]. Two were by the front gate, possibly from the shots fired earlier in the morning at the car. [Murakami Depo. at 16]. Another shell was found in the front of the residence, near the kitchen, consistent with a shot being fired 45 minutes earlier at about 0407 hours. [Id.]. Others might have been from shots fired to break up the party earlier. In any event, nothing was found near where it should have been if Long had shot at Marini or Canella, who were on the perimeter of the premises, probably in a ditch.

Marini and others) testified that Long fired just before Sterling fired, and that they heard the shot. This testimony is supported by the "CAD" printout of contemporaneous radio transmissions, as verified by dispatcher Battease, which indicates shots fired at 04:51:33 ("shots fired . . . he just shoot at us").

The dispute of fact, however, does not resolve matters for this motion. Rather, the question here for purposes of qualified immunity is whether that dispute is "material." That is, even assuming Long did *not* shoot, the Court is still obligated to consider whether, from the other undisputed facts, Sterling is nonetheless entitled to qualified immunity. As set forth in the previous order, under the Supreme Court's test for qualified immunity articulated in *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), courts must first consider whether "[t]aken in the light most favorable to the party asserting the injury, do the facts . . . show the officer's conduct violated a constitutional right?" If the answer is no, there is qualified immunity. If the answer is yes, the court then asks whether the right was "clearly established." *Id.* at 201-02, 121 S.Ct. 2151.

Again, "[a] police officer may reasonably use deadly force where he 'has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Billington v. Smith,* 292 F.3d 1177, 1184 (9th Cir.2002) (quoting *Garner,* 471 U.S. at 11, 105 S.Ct. 1694). The Court should consider "the totality of the facts and circumstances in the particular case including 'the severity

of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Blanford v. Sacramento County,* 406 F.3d 1110, 1115 (9th Cir.2005) (quoting *Graham,* 490 U.S. at 396, 109 S.Ct. 1865).

The reasonableness inquiry is objective, without regard to the officer's good or bad motivations or intentions. *Id.* The court judges reasonableness "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and allowing "for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.*

Even if Long did not fire immediately before Sterling fired, the following facts are uncontested or cannot reasonably be disputed:

1) Long had already shot twice at people (or at their car as it drove away). Although Plaintiff argues that Long did not actually know whether he *hit* anyone (he did of course hit two people who went to the hospital and called 911), it cannot reasonably be disputed that Long knew he had fired at them.

2) Long was barricaded in his residence, surrounded by police. He was certainly armed (he was seen several times walking outside with a rifle and one was found next to or under him after he was shot). He did not surrender, although there might be

some question whether he wanted to or attempted to surrender. Despite Plaintiff's argument to the contrary, it cannot reasonably be disputed that Long was in fact armed. Even assuming Kurt Umeno "hid" the rifle earlier – after Long had fired at around 02:00 hours – Long must have then "found" it because there is undisputed testimony from multiple witnesses that Long was seen carrying a rifle from before 04:07 (when he fired at something in the "front" or kitchen area of the house) and when he was shot at 04:52 hours.

3) Long was agitated. He told police to turn off the spotlight or lights shining on the house, or he would shoot. [Marini Affidavit at 3 ("Long went on to say he had firearms and would use them"); Yamada Affidavit at 2-3; Edayan Decl. at 2 ("Dustan said he was going to shoot some cops"); Sterling Affidavit at 2-3]. Even Umeno says that Long told him "police were coming in the front window and he could see them in other places on his property." [Umeno Decl. at ¶ 16]. Umeno heard Long yell at police that they had 10 seconds "to get the 'F' out of his yard." [Id.]. He heard Long "do a count-down, shouting to the officers to get off his property." [Id.]. Umeno's declaration is consistent with testimony of Marini that Long yelled at them "I told you f * * * ers to get the f * * k back . . . Have some of this." [Marini affidavit, ¶ 23; CAD timeline about 04:47:41 ("He was clg [calling] threats . . . we had to jump in the ditch")]. Umeno's declaration is also consistent with other testimony that Long threatened to shoot police ("bring it on, let's

see it") if the spot lights were not turned off. [Sterling Affidavit at ¶¶ 14-16].

4) Officers Marini and Cannella were on the perimeter in a ditch. (There is some discrepancy as to when exactly they jumped into the ditch.) Sterling and Dalbec were positioned across the street as "counter snipers" viewing Long through scopes. Sterling was hearing the radio transmissions between police. [Sterling Affidavit at 2-3]. Before Officer Sterling fired at Long, Officer Marini radioed "he's shooting at us." [E.g., Marini Affidavit at 4; Yamada Affidavit at 3; Ben-Rajab Depo. at 52]. This is also confirmed by the CAD stenographic record of radio transmissions at 04:51:33 hours. Sterling heard this. [Sterling Affidavit at 4]. Sterling then shot at Long. (Sterling says it was immediately after or nearly simultaneously with the transmission.) The CAD stenographic record indicates at 04:52:18 "sniper shot taken." Although dispatcher Battease indicates there might have been some delay with the inputting of the text, there is no dispute that Long was shot right about 04:52 hours.

Given these undisputed facts, the Court finds as a matter of law that Officer Sterling is entitled to qualified immunity. Considering all of the circumstances and viewing the disputed facts in favor of Plaintiff, the Court readily concludes that Officer Sterling had probable cause to believe that Long was an "immediate" threat of serious physical harm to other officers located on the perimeter next to Long. *See, e.g., Blanford,* 406 F.3d at 1116 (finding qualified

immunity where deadly force was used to stop suspect appearing to threaten others with a sword); *Billington,* 292 F.3d at 1184-85 (finding qualified immunity where deadly force was used despite question of fact whether, at the moment of the shooting, the suspect and officer were grappling over a gun, because the factual dispute was immaterial). Long had fired before, he said he was going to fire, Marini transmitted that Long was shooting at them, and Sterling saw and heard this. It was objectively reasonable under these undisputed facts for Sterling to believe that a shot was needed.

This belief would be so even if, construing disputes in favor of Plaintiff, Long did not actually fire immediately before he was shot. From Sterling's perspective (and, again, without the benefit of 20/20 hindsight as cautioned in *Graham,* 490 U.S. at 393, 109 S.Ct. 1865), the amount of force was reasonable. Indeed, Sterling was entitled to have made a mistake – even a tragic mistake – in his perception.[4] *See, e.g., Saucier,* 533 U.S. at 206, 121 S.Ct. 2151 ("Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those

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[4] This is not to suggest that the shooting was not necessary. We cannot know that. Even assuming Long had not fired immediately before Sterling fired-given what was indisputably occurring-Long might have shot immediately thereafter. But, again, under *Garner* the test here is whether Sterling had "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."

situations courts will not hold that they have violated the Constitution"); *Blanford,* 406 F.3d at 1116 (affirming grant of qualified immunity where mistaken use of deadly force was nevertheless objectively reasonable); *Billington,* 292 F.3d at 1184 ("an officer might be reasonably mistaken as to the facts justifying his actions . . . so that an officer could use objectively excessive force without clearly violating the constitution").

The Court has given much thought to Plaintiff's argument that we must be especially careful in deadly force cases where the best witness (i.e., the victim) to contradict the officer is actually killed rather than merely injured. *See Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir.1994) ("Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. . . . The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts"). But, unlike the situation described in *Scott,* here there is much evidence and many *other* witnesses to determine whether an officer's conduct was objectively reasonable. *See Billington,* 292 F.3d at 1181-82 (distinguishing *Scott* because there were several other witnesses). In any event, the Court has carefully considered all the evidence in the record as *Scott* instructs and concludes that there was no constitutional violation.

2. Municipal Liability

The Court also grants Defendants' motion as to claims against the City and County of Honolulu. If there is no constitutional violation, there can be no municipal liability. *See City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.") (emphasis in original); *Fairley v. Luman,* 281 F.3d 913, 916 (9th Cir.2002) ("Exoneration of [the officer] of the charge of excessive force precludes municipal liability for the alleged unconstitutional use of such force").

In any event, to find municipal liability under *Monell v. New York City Dep't of Soc. Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), for civil rights violations under 42 U.S.C. § 1983, Plaintiff must prove "that the defendants have customs or policies which amount to deliberate indifference to their constitutional rights and that these policies are the moving force behind the constitutional violations." *Oviatt v. Pearce,* 954 F.2d 1470, 1474 (quoting *City of Canton v. Harris,* 489 U.S. 378, 389-91, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989)) (internal quotation and editorial marks omitted).

That is, under *City of Canton,* plaintiffs must prove that the official policy was "deliberately indifferent" to their constitutional rights. "This occurs

when the need for more or different action 'is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, that the policymakers ... can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390, 109 S.Ct. 1197.

Plaintiff bases municipal liability primarily on a failure to train or discipline theory. The Court assumes as true for purposes of this motion that Officer Sterling had two prior excessive force complaints lodged against him in the late-1990's that resulted in a letter or letters of reprimand. Those complaints were based upon alleged striking persons who were being arrested.

Those prior complaints or incidents do not establish "deliberate indifference" regarding a failure to train or discipline. The situations did not involve improper use of firearms. They did not involve the use of deadly force. They resulted in a form of discipline in a letter of reprimand (i.e., the police department did not condone the excessive use of force). They do not indicate "deliberate indifference" on the part of the Honolulu Police Department *See, e.g., City of Oklahoma City v. Tuttle,* 471 U.S. 808, 824, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985) (indicating that municipal liability based upon alleged inadequate training could not be derived from a single incident of misconduct by a non-policy-making employee). To hold the City liable for retaining Sterling under this record would mean that the City would have to fire every officer who ever used any amount of unnecessary force.

As for a failure to train, the undisputed evidence is that the police department has an extensive training program that includes instruction in use of deadly force. [*See. e.g.*, Affidavit of Tamashiro]. Plaintiff points out that the Honolulu Police Department's written policy explaining "deadly force" *changed* (or at least the wording changed) from 2000 to 2002. Prior to the shooting of Long, the policy explained that "deadly force shall be used only when an officer reasonably believes that it is necessary." [Doc. A00047, attached to Deposition of Donohue]. Sometime after the shooting, the policy was changed to read "deadly force may be used only when an officer reasonably believes that the use of force is necessary to defend his or her own life or that of another person in immediate danger of death or serious bodily injury." [Exhibit to Donohue deposition].

The prior policy statement is not incorrect.[5] Perhaps it could have been more detailed to mirror the

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[5] In its entirety it provided:

> Deadly force is force used with the intent of causing, or which the actor knows will create a substantial risk of causing, death or serious bodily injury. It does not include force that is not likely to cause death or serious injury, but which unexpectedly results in such. Deadly force shall be used only when an officer reasonably believes that it is necessary.
>
> The U.S. Supreme Court has ruled that the use of deadly force is a seizure subject to the "reasonableness" requirement of the Fourth Amendment. Even where an officer has probable cause to arrest a subject, it may be unreasonable to do so using deadly force.

[Donohue Depo. Exh. A-00047].

factors in *Graham*, as does the 2002 statement.[6] But even so, it does not mean that the City failed to train in the use of deadly force such that the policy was "deliberately indifferent" to the rights of citizens. The evidence indicates that officers knew the proper standard. [*E.g.*, *compare* Dalbec depo. at 19] ("If a person is a threat to someone else or myself to cause them serious [bodily] injury or death") *with* the legal standard from *Garner* ("[a] police officer may reasonably use deadly force where he has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others"). Moreover, Plaintiff has failed to establish a question of fact as to the necessary causal-connection between any assumed deficiency and Plaintiff's constitutional

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[6] The December 18, 2002 statement provides:

> Deadly force is force used with the intent of causing, or which the actor knows will create a substantial risk of causing, death or serious bodily injury. It does not include force that is not likely to cause death or serious injury, but which unexpectedly results in such. Deadly force may be used only when an officer reasonably believes that the use of such force is necessary to defend his or her own life or that of another person in immediate danger of death or serious bodily injury.
>
> The U.S. Supreme Court has ruled that the use of deadly force is a seizure subject to the "reasonableness" requirement of the Fourth Amendment. Even where an officer has probable cause to arrest a subject, it may be unreasonable to do so using deadly force.

[Donohue Depo. Exh. following A-00047].

injury (if there were one). *See City of Canton,* 489 U.S. at 390-91, 109 S.Ct. 1197 (requiring proof that the identified deficiency in training was the actual cause of the injury and commenting that "adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable").

Next, there is insufficient evidence that, after the shooting, the City should be held liable for failing to aid Long, improperly delaying medical attention, or somehow allowing him to "bleed to death." The objective (and subjective) evidence indicates clearly that police did not know the particulars of the threat after Long was shot. From the police's perspective, Long could have been only injured and still armed and capable of "shooting some cops" as he said he would. As far as police knew, there could have been others who were armed (and there was at least one other person at the residence). [E.g., Deposition of Burns, at 44-46]. It was prudent for police to wait for the national guard vehicle to enter the premises. There can be no due process-type violation here.[7]

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[7] As Plaintiff acknowledged at oral argument, there can be no Eighth Amendment claim here for the alleged failure to aid. Eighth Amendment claims would be restricted to prisoners after conviction. *See generally Gibson v. County of Washoe,* 290 F.3d 1175, 1187 (9th Cir.2002) ("Because [plaintiff] had not been convicted of a crime . . . his rights derive from the due process clause rather than the Eighth Amendment's protection against cruel and unusual punishment") (citations omitted).

Finally, Plaintiff asserts that the City "ratified" Officer Sterling's actions by failing to discipline him (or otherwise having a defective internal affairs investigation policy) in this particular case. This theory fails for lack of causation. Even if the after-the-fact internal investigation here was somehow a "coverup" (and there is no such evidence), it would not have prevented the shooting of Long. *See Haugen v. Brosseau,* 351 F.3d 372, 393 (9th Cir.2003) ("[Plaintiff] cannot, of course, argue that the municipality's later action (or inaction) caused the earlier shooting"), *rev'd on other grounds,* ___ U.S. ___, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). In *Haugen,* the Ninth Circuit also rejected the type of "ratification" theory espoused by Plaintiff's here. *Id.* ("the plaintiff must show that the triggering decision was the product of a 'conscious affirmative choice' to ratify the conduct in question. . . . there are no facts . . . that suggest that the single failure to discipline. . . . rises to the level of such a ratification.") (citation omitted).

Even assuming, as Plaintiff emphasizes, that the internal investigation did not focus on a missing casing or on prior complaints of excessive force against Sterling, this is not evidence that the City itself ratified the shooting of Long. *See, e.g., Kanae v. Hodson,* 294 F.Supp.2d 1179, 1190 (D.Haw. 2003) ("liability does not necessarily arise based only on a failure to reprimand. Something more than the failure to reprimand is needed to survive a motion for summary judgment"). As the Court reasoned in *Kanae*:

> [t]he law does not say that every failure to discipline an officer who has shot someone is evidence of a 'whitewash' policy or some other policy of 'sham' investigations. The law does not say that, whenever an investigative group accepts an officer's version over a victim's differing version, this acceptance establishes a policy for which a municipality may be held liable under § 1983.

Id. at 1191. The Court finds no basis for a ratification theory of municipal liability here.

3. Common Law Claims

Plaintiff also alleged state law claims for infliction of emotional distress and punitive damages that are essentially dependent upon the federal claims. If the federal claims fail then Plaintiff cannot prove intentional infliction of emotional distress or malice for purposes of punitive damages. There is no evidence of negligence for purposes of a negligent infliction of emotional distress claim. Moreover, municipalities are immune from punitive damages in the circumstances of this case. *Lauer v. YMCA,* 57 Haw. 390, 557 P.2d 1334, 1342 (1976) ("Public policy dictates the conclusion that the City, as a municipal corporation, should not be held liable for punitive damages"); *City of Newport v. Fact Concerts,* 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981) (A local government unit is immune from punitive damages under § 1983). The state law claims are dismissed.

CONCLUSION

(1) Officer Patrick Sterling is entitled to qualified immunity.

(2) Because there was no constitutional violation, the City likewise cannot be liable under 42 U.S.C. § 1983. Even if there were a violation, there is no "deliberate indifference" for purposes of municipal liability.

(3) For similar reasons, the state law claims fail as well.

Accordingly, the Court GRANTS Defendants' Revised Motion for Summary Judgment, filed on May 11, 2005.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CYNTHIA MARIE LONG, individually, and as Personal Representative of the Estate of Dustan Dominic Long, Plaintiff-Appellant, v. CITY AND COUNCIL OF HONOLULU; et al., Defendants-Appellees.	No. 05-16567 D.C. No. CV-02-00271-SPK/KSC District of Hawaii, Honolulu ORDER (Filed Feb. 5, 2008)

Before: O'SCANNLAIN, TASHIMA, and M. SMITH, Circuit Judges.

Judges O'Scannlain, Tashima, and M. Smith have voted to deny the petition for panel rehearing; Judges O'Scannlain and M. Smith have voted to deny the petition for rehearing en banc, and Judge Tashima so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

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No. 07-1385

FILED

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

CYNTHIA MARIE LONG, individually, and as Personal Representative of the Estate of Dustan Dominic Long Decedent,

Petitioner,

v.

CITY AND COUNTY OF HONOLULU; PATRICK A. STERLING, Officer, Honolulu Police Department; JOHN DOES 1-10,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly applied established precedent in affirming summary judgment in favor of the Respondent officer on the basis that the officer's use of deadly force met the objective reasonableness standard for qualified immunity.

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STATEMENT OF THE CASE

In this action for relief under 42 U.S.C. § 1983, Petitioner seeks to rewrite established Supreme Court and Ninth Circuit precedent on qualified immunity and summary judgment principles by claiming that immaterial factual disputes based upon speculative inferences should have precluded summary judgment in Respondents' favor. Petitioner's attempt to solicit this Court's review by reciting the mantra of "credibility issues" falls far short of the "compelling reasons" set forth in Rule 10 of the *Rules of the Supreme Court of the United States* for the exercise of this Court's jurisdiction.

Contrary to Petitioner's assertions, the Ninth Circuit, consistent with this Court's holding in *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2, 197, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004), viewed material facts in the light most favorable to Petitioner, and drew all reasonable inferences in Petitioner's favor. Under this standard, and applying the principles established in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), the Ninth Circuit found that Respondents' use of force was objectively reasonable under the circumstances, and that the district court's grant of summary judgment on qualified immunity principles was proper. Petitioner's mere dissatisfaction with the Ninth Circuit's factual findings and application of law simply does

not warrant this Court's attention, and the petition for writ of certiorari should be denied.

STATEMENT OF FACTS

On June 3, 2001, Dustan Long (hereinafter "Long") was holding a party at his home in Wahiawa, Hawaii. At about 2:00 a.m., a group of uninvited people arrived and were involved in an altercation. Long fired a .22 caliber rifle into the air and shouted for everyone to leave. The group of uninvited people then began to beat up Long's friend, and Long fired shots to stop the fight. As this group got into a car to leave, Long fired several more shots in their direction, injuring two of the passengers, who then called the police.

The Honolulu Police Department's Specialized Services Division (hereinafter "SSD") was called to the scene. The police told Long to surrender, but he instead barricaded himself in the house. Officer Patrick Sterling ("Officer Sterling") was a counter-sniper with SSD, and was one of the officers who reported to the Long residence. He was positioned on a rooftop across the street, while other SSD officers were positioned at the entrance to the driveway of the Long residence.

Long walked around the property throughout the night, holding the .22 caliber rifle as he shouted various threats at the police. Long yelled at the police that they had ten seconds to get the "f--- out of his

yard," and began counting down from ten. A shot was then fired from inside the house.

Sometime later, Long was later heard making comments like, "Bring it on, let's see it." Long threatened to shoot out the police lights if they did not turn them off. He also demanded that the police leave and turn off their lights or he would shoot them in the face.

SSD Officers Keith Marini and Michael Cannella were attempting to set up a perimeter around the Long property. Officers Marini and Cannella were positioning themselves closer to the house, behind a large bamboo hedge at the side of the house. Long was walking back and forth between the carport and garage just on the other side of the hedge where officers Marini and Cannella were located. Officers Marini and Cannella reported over the radio that they jumped into a ditch for cover because Long was shouting threats. Long shouted to the officers, "I told you f---er's get the f--- back," and "Have some of this." The officers then reported over the radio, "Shots fired. He just shoot [sic] at us."

Officer Sterling fatally shot Long with a single bullet fired within a couple of seconds after hearing Officer Marini's communication that shots were fired. According to Officer Sterling, he saw Long raise his rifle to about chest level and fire one shot. However, no shell casing was recovered from this alleged shot. The Ninth Circuit therefore assumed on appeal that no shot was actually fired by Long at that time. When

the police finally entered the property, Long was found dead, lying next to a rifle.

Petitioner subsequently filed the present action against Officer Sterling and the City and County of Honolulu, seeking damages, *inter alia*, under 42 U.S.C. § 1983 for use of excessive force against Long. Respondents moved for summary judgment on the grounds that Officer Sterling was entitled to qualified immunity, and there was no evidence to support municipal liability. The motion was denied without prejudice to allow for more discovery.

Respondents thereafter renewed their motion for summary judgment. The district court granted the motion, holding that there was no constitutional violation and no basis for municipal liability. The opinion of the United States District Court for the District of Hawaii is found at *Long v. City and County of Honolulu*, 378 F.Supp.2d 1241 (D.Haw. 2005). (Petitioner's ["Pet."] Brief, at Appendix ["App."] 14-31).

Final judgment was entered in favor of Respondent, and Petitioner appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit denied the appeal and affirmed, at *Long v. City and County of Honolulu*, 511 F.3d 901 (9th Cir. 2007). (Pet. Brief, at App. 1-13).

Petitioner's petition for rehearing and suggestion for rehearing *en banc*, which raised the very same

issues and arguments presented to this Court, was denied on February 5, 2008. (Pet. Brief, at App. 32).

REASONS FOR DENYING THE PETITION

A. The "Question Presented" By Petitioner Does Not Apply to This Action.

Petitioner is attempting to frame her "Question Presented" as one requiring this Court's review by claiming that this case involves a decision by the Ninth Circuit which is in direct conflict with this Court's precedent regarding summary judgment law. However, the essence of Petitioner's argument, and the true question presented in this case, is Petitioner's disagreement with the Ninth Circuit's factual findings and application of the rule on summary judgment. Accordingly, under Rule 10 of the *Rules of the Supreme Court of the United States*, the instant petition does not involve any "compelling reasons" that would warrant this Court's review.

Petitioner argues that where there are credibility issues, summary judgment should be denied and the case be allowed to proceed to trial. (Pet. Brief, at 9-10). Petitioner cites to alleged discrepancies in reports of the incident (Pet. Brief at 5-8), and argues that these inconsistencies raised questions of fact that should have precluded summary judgment had the Ninth Circuit properly applied established summary judgment principles.

Contrary to Petitioner's assertions, however, the Ninth Circuit correctly applied the summary judgment standard by resolving factual disputes in favor of Petitioner, and still found that Officer Sterling's use of force was objectively reasonable under the circumstances. The Ninth Circuit was well aware of its own admonition to "be wary of self serving accounts by police officers when the only non-police eyewitness is dead," (Pet. Brief, at App. 8 [citing *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)]), but noted that unlike the situation in *Scott*, there were other reports and evidence of the officers' actions. *Id.*

Moreover, the Ninth Circuit specifically rejected Petitioner's argument that discrepancies in the accounts of the incident gave rise to factual disputes which should preclude summary judgment. The court stated that Petitioner's "claims of factual error in the police accounts do not change our analysis." (Pet. Brief, at App. 8). Rather, the Ninth Circuit found that such discrepancies were immaterial, and therefore did not create genuine issues of material fact. *Id.* The Ninth Circuit's decision was therefore consistent with this Court's precedent on summary judgment law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 1505, 91 L.Ed.2d 202 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted") (citation omitted).

As seen, Petitioner's primary contention here is that the Ninth Circuit overlooked credibility issues that should have precluded summary judgment. The petition does not involve any conflict with this Court's precedent regarding summary judgment, or for that matter, qualified immunity. The instant petition therefore should be denied.

B. The Ninth Circuit Properly Applied Precedent in Affirming Summary Judgment in Favor of Officer Sterling on the Basis That the Officer's Use of Deadly Force Met the Objective Standard for Qualified Immunity.

The Ninth Circuit, in holding that Officer Sterling's use of deadly force was objectively reasonable, properly applied established law on qualified immunity. It analyzed Petitioner's claim of deadly force under the Fourth Amendment's reasonableness standard, in accordance with *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

Consistent with Supreme Court and Ninth Circuit precedent, the court noted that an officer's use of deadly force is "reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (quoting *Garner*, 471 U.S. at 3, 105 S.Ct. 1694). Moreover, the Ninth Circuit analyzed

Officer Sterling's claim of qualified immunity in accordance with the following:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Graham, 490 U.S. at 396, 109 S.Ct. at 1872, 104 L.E.2d 443 (quoted in *Henrich*, 39 F.3d at 914).

In addition, the Ninth Circuit also viewed facts in the light most favorable to Petitioner, and drew every reasonable inference in Petitioner's favor. Accordingly, given the factual dispute about whether Long fired at Officers Marini and Cannella immediately before he was shot by Officer Sterling, the court assumed that no shot was actually fired by Long. (Pet. Brief, at App. 4).

In fact, the Ninth Circuit specifically stated that whether Long actually fired at Officers Marini and Cannella was "immaterial," as it was "enough that Sterling heard the radio transmission and observed Long point the rifle in the officers' direction." (Pet. Brief, at App. 8). In this regard, the Ninth Circuit's decision was consistent with this Court's instruction

in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), in which this Court stated:

> An officer might correctly perceive all of the relevant facts but have a mistaken belief as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

Saucier, 533 U.S. at 205, 121 S.Ct. at 2158, 150 L.Ed.2d 272.

The Ninth Circuit's recognition that Officer Sterling's actions were objectively reasonable even assuming Long had not fired a shot toward Officers Marini and Canella is entirely consistent with established caselaw on qualified immunity. As this Court has held previously:

> The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' . . . This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued.

Hunter v. Bryant, 502 U.S. 224, 229, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991) (citations omitted).

Even under Petitioner's version of events, the Ninth Circuit found that the following undisputed material facts supported a finding that Officer

Sterling's actions were objectively reasonable under the circumstances:

> 1. Officer Sterling had observed Long's agitated behavior;
>
> 2. Officer Sterling had heard Long threaten to shoot the police;
>
> 3. Officer Sterling had observed Long carrying a .22 caliber rifle and walking about his property;
>
> 4. Officer Sterling knew that Long had previously shot at a car full of people and wounded two people therein earlier that night;
>
> 5. Officer Sterling heard Officers Marini and Cannella radio that Long was yelling threats at them; and
>
> 6. Officer Sterling heard Officer Marini over the radio that Long was shooting at them.

(Pet. Brief, at App. 8).

The Ninth Circuit properly observed that under these circumstances, Officer Sterling had "probable cause to believe that Long posed an immediate danger to these officers." (Pet. Brief, at App. 8). With the foregoing, and applying established qualified immunity principles, the court concluded, "In the exigent circumstances of that night, Sterling acted in an objectively reasonable manner." (Pet. Brief, at App. 8).

As the Ninth Circuit correctly acknowledged, Officer Sterling did not have to be correct in his perception that Long had aimed and fired his rifle at Officers Marini and Cannella. Even if Officer Sterling's belief that Long had fired a shot at Officer Marini was mistaken, qualified immunity only requires that Officer Sterling's belief be objectively reasonable regarding the amount of force he believed was necessary under the exigent circumstances of that early morning. "[Q]ualified immunity can apply in the event the mistaken belief was reasonable." *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2159, 150 L.Ed.2d 272.

Thus, the Ninth Circuit properly analyzed Petitioner's claim of deadly force, and Officer Sterling's claim of qualified immunity, consistent with Supreme Court and Ninth Circuit precedent. Contrary to Petitioner's contention, the Ninth Circuit's decision does not conflict with Supreme Court precedent. Rather, the Ninth Circuit correctly drew inferences in Petitioner's favor where appropriate, reviewed the incident from the perspective of a reasonable officer at the scene facing the exigent circumstances of that night, and found no genuine issues of **material** fact to preclude summary judgment in Respondents' favor. Petitioner's mere disagreement with the Ninth Circuit's decision does not justify invoking the jurisdiction of this Court. There are no compelling reasons warranting this Court's review, and the Petition for Writ of Certiorari should therefore be denied.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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